Supreme Court, U.S.
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No. 91-79

In The

Supreme Court of the United States

October Term, 1991

DEBORAH S. BLUE AND RONALD M. BLUE,

Petitioners,

v.

GENESEE MEMORIAL HOSPITAL, INC.,

Respondent.

Petition For Writ Of Certiorari To The State Of Michigan Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In an unpublished opinion per curium released on April 27, 1990, the Court of Appeals of the State of Michigan affirmed the Trial Court's grant of Summary Disposition to Respondent, Genesee Memorial Hospital, Inc. It was the position of Respondent that Petitioners' cause of action was barred by statutory immunity as construed by **ROSS v. CONSUMERS POWER CO. (On Reh.), 420 MICH. 567; 363 N.W.2d 641 (1984)** and **HYDE v. UNIVERSITY OF MICHIGAN BOARD OF REGENTS, 426 MICH. 227; 393 N.W.2d 847 (1986)**. Inter alia, Petitioners argued that **HYDE's** limited retractive application of the **ROSS** reformulation of statutory governmental immunity unconstitutionally denied them due process and equal protection of the law. The Court of Appeals disagreed, noting that **ROSS** controlled because Petitioners' case was commenced *after* **ROSS** was decided. The Court of Appeals observed that the Michigan Supreme Court had the constitutional power to decide what law the state courts would apply in Michigan and that judicial decisions regarding retroactivity or prospectivity of a new rule of law imposed by judicial decision are generally free of constitutional restraints. As a result, it found that there was no constitutional impediment in this case.

The question presented is whether the rule of limited retoractivity applicable to **ROSS** which was announced in **HYDE** violates Petitioners' rights to due process and equal protection of the law.

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The Opinion of the Court of Appeals of the State of Michigan is unreported and is printed in its entirety in Petitioners' Supplemental Appendix. The excerpted Opinion of the Circuit Court of Genesee County, Judgment of the Circuit Court of Genesee County, and Denial of Leave to Appeal of the Michigan Supreme Court are printed in Petitioners' Appendix A, pp. 4a, 6a, and 8a, respectively.

STATEMENT OF THE CASE

On October 11, 1985, Petitioners Ronald and Deborah Blue brought suit against Respondent, Genesee Memorial Hospital, Inc. in the Circuit Court for the County of Genesee, Michigan, alleging professional negligence by nurses and a nurse anesthetist in positioning and/or movement of Mrs. Blue while she was under general anesthesia during the performance of a routine tonsillectomy on October 17, 1983. Petitioners also sued the surgeon and his professional corporation, Leonard L. J. Dias, M.D., P.C., and Leonard L. J. Dias, M.D., alleging professional negligence. The action against Dr. Dias and his professional corporation, has been stayed pending the outcome of the instant appellate proceedings.

At the time of Mrs. Blue's surgery, Genesee Memorial Hospital was a public general hospital owned and operated by Genesee County, Michigan. On January 1, 1984, Genesee Memorial Hospital became a private corporation, Genesee Memorial Hospital, Inc., Petitioner herein.

See Opinion of the Court of Appeals, §I, pp. 1-4, found at Supplemental Appendix, pp. 1-5.

In 1964, the Michigan Legislature enacted a governmental immunity act. **MCL 691.1404, et seq.; MSA 3.996 (101) et seq.** The act was later amended in 1971 and 1986.

In 1978, the Michigan Supreme Court held that the operation of a public general hospital is not a governmental function entitled to immunity from tort liability under **MCL 691.1407; MSA 3.996 (107). PARKER v. CITY OF HIGHLAND PARK, 404 MICH. 183; 273 N.W.2d 413 (1978).**

In 1984, following years of grappling with the concept of "governmental function", the Michigan Supreme Court reformulated the definition of "governmental function" as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law." **ROSS v. CONSUMERS POWER CO. (On Reh.), 420 MICH. 567, 620; 364 N.W.2d 641 (1984).** Although decided on December 28, 1984, the **ROSS** decision was released on January 22, 1985.

In 1986, the Michigan Supreme Court held that the **ROSS** definition of "governmental function" which replaced the earlier definition in **PARKER** would be given limited retroactive effect in cases involving public general hospitals: "Sovereign or governmental immunity from tort liability will be extended to a governmental agency operating a public general hospital or medical facility only in those cases involving a cause of action accruing prior to July 1, 1986, which was pending on or after January 22, 1985, or commenced on or after that date." (Footnote omitted) **HYDE v. UNIVERSITY OF**

MICHIGAN BOARD OF REGENTS, 426 MICH. 233, 246; 393 N.W.2d 847 (1986).

The decision in **HYDE** was argued on March 4, 1986 and decided on October 3, 1986. In the interim, on July 7, 1986, the Michigan Legislature amended the governmental immunity act and formally adopted the Michigan Supreme Court's definition of "governmental function". See **1986 PA 175; MCL 691.1401 (f); MSA 3.996 (101) (f)**. The amendatory provision also provided that, with the exception of hospitals owned or operated by the Departments of Mental Health or Corrections, public general hospitals or county medical care facilities were not entitled to statutory immunity. See **1986 PA 175; MCL 691.1407 (4); MSA 3.996 (107) (4).**

Because Petitioners' lawsuit was filed after January 22, 1985 (the effective date of the **ROSS** decision) and Petitioners' claim accrued prior to July 1, 1986 (the effective date of **1986 PA 175**), Respondent moved in the Circuit Court of Genesee County for summary disposition, inter alia, on the ground of statutory immunity. Petitioners raised numerous arguments in opposition, including a constitutional challenge to the **HYDE** Court's decision to give limited retroactive effect to the **ROSS** reformulation of "governmental function". In dismissing Petitioners' action as against Respondent, the Trial Court rejected Petitioners' constitutionally-based argument, having found a rational basis for limited retroactive effect.

The Michigan Court of Appeals affirmed. The Court of Appeals also rejected Petitioners' argument that the rule of limited retroactivity adopted in **HYDE** makes an

irrational, arbitrary, and unreasonable distinction between tort suits filed before January 22, 1985, and those filed thereafter, despite the fact that all such claimants acquired their respective causes of action prior to the effective date of the **ROSS** decision. The Court of Appeals further rejected Petitioners' claim that they had been deprived of a property right without due process of law.

The Court found that Petitioners' equal protection argument had no merit given the Michigan Supreme Court's constitutional power to determine what law is to be applied in the courts of the State of Michigan, see e.g. **HYDE, supra, 426 MICH. 237**, a power necessarily implied from its constitutionally-recognized review and oversight functions:

> "Even if we thought that this contention had some merit, we would be extremely reluctant to hold that a rule set forth by our Supreme Court is unconstitutional given our posture as an inferior court. Presumably, the **HYDE** Court in devising a rule of retroactivity thought through the constitutional repercussions of its decision, and a conclusion of constitutional validity can therefore be fairly implied from the holding itself." See Slip Opinion, § VI, pp. 9-10, found at Supplemental Appendix, pp. 11-12.

The court found no violation of Petitioners' right to due process of law, citing the decision in **HELMER v. PEOPLE'S COMMUNITY HOSPITAL AUTHORITY, 161 MICH. APP. 675, 679-680; 411 N.W.2d 823 (1987). Id.**

On April 30, 1991, the Michigan Supreme Court denied Petitioners' application for leave to appeal. From

such denial, Petitioners filed their Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Generally, judicial decisions regarding the retroactivity or prospectivity of a new rule of law created by judicial decision are free of constitutional restraints. In evaluating non-retroactivity questions, this court has generally considered three separate factors: (1) whether the decision to be applied non-retroactively represents a "clear break" from past precedent or is an issue of first impression whose resolution was not clearly foreshadowed; (2) the history, purpose and effect of the new rule; (3) the inequity that would be imposed by retroactive application. Petitioners do not satisfy any of these factors.

ARGUMENT

The rule of limited retroactivity announced in HYDE v. UNIVERSITY OF MICHIGAN BOARD OF REGENTS, 426 MICH. 227; 393 N.W.2d 847 (1986) does not violate Petitioners' rights to due process and equal protection of the law.

It is traditional common-law theory and generally true today that overruling decisions operate retroactively. Indeed, there was no authority for the proposition that judicial decisions made law only for the future. **LINKLETTER v. WALKER, 381 U.S. 618, 622-623, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)**. Such a view was premised on

the idea that a court does not make the law but merely discovers it, that early decisions are merely evidence of the law and not the law itself, and that when a court overrules an earlier decision, it is merely discovering what is really the law. The overruled decision is treated not as if it is "bad law", but as if it never was the law. **FLEMING v. FLEMING, 264 U.S. 29, 68 L. Ed. 547, 44 S. Ct. 246 (1924); STRIKER v. PANCHER, 317 F. 2d 780 (6th Cir., 1963).**

Retroactive operation of an overruling decision is neither required nor prohibited by the Constitution. Whether and to what extent a new rule adopted in an overruling decision will be given retroactive effect is not a matter of constitutional compulsion, but a matter of judicial policy. **LINKLETTER v. WALKER, supra, 381 U.S. 627.**

In civil cases involving a non-retroactivity question, this court has generally considered three separate factors. **CHEVRON OIL CO. v. HUSON, 404 U.S. 97, 106-107, 30 L. Ed. 2d 296, 306, 92 S. Ct. 349 (1971),** cited with approval in **UNITED STATES v. JOHNSON, 457 U.S. 537, 563, 73 L. Ed. 2d 202, 222-223, 102 S. Ct. 2579 (1982).**

First, the decision to be applied non-retroactively must establish a new principal of law, either by overruling clear past precedent on which the litigants may have relied, see e.g., **HANOVER SHOE v. UNITED SHOE MACHINERY CORP., 392 U.S. 481, 496, 20 L. Ed. 2d 1231, 1243, 88 S. Ct. 2224 (1968),** or by deciding an issue

of first impression whose resolution was not clearly foreshadowed, see e.g. **ALLEN v. STATE BOARD OF ELECTIONS, 393 U.S. 544, 572, 22 L. Ed. 2d 1, 20, 89 S. Ct. 817 (169).**

Second, this court has stressed that it is necessary to weigh the merits and demerits of each case, by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation. **LINKLETTER v. WALKER, supra, 381 U.S. 627-629.**

Finally, this court has weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial and inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by upholding non-retroactivity." **CIPRIANO v. CITY OF HOUMA, 395 U.S. 701, 706, 23 L. Ed. 2d 647, 652, 89 S. Ct. 1897 (1969).**

In the civil context the "clear break" principle has usually been held to be the threshold test for determining whether a decision should be applied non-retroactively. **CHEVRON OIL CO. v. HUSON, supra, 404 U.S. 106.** Once it has been determined that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, this court has gone on to examine the history, purpose and effect of the new rule as well as the inequity that would be imposed by its retroactive application." **CHEVRON OIL CO. v. HUSON, supra, 404 U.S. 106-107. See, also, HANOVER SHOE, INC. v.**

UNITED SHOE MACHINERY CORP, supra, 392 U.S. 499.

Such a break has been recognized only when a decision explicitly overrules a past precedent of this court. **DESIST v. UNITED STATES, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030 (1969); WILLIAMS v. UNITED STATES, 401 U.S. 646, 28 L. Ed. 2d 388, 91 S. Ct. 1148 (1971).**

In addition, the administration of justice is a factor which has been considered in the question whether to give retroactive effect to an overruling decision. Retroactive effect which would cast substantial doubt upon the validity of numerous prior judgments and would impose a great burden on the administration of justice by allowing many cases to be relitigated is one of the factors favoring denial of unlimited retroactive effect to the overruling decision. **LINKLETTER v. WALKER, supra, 381 U.S. 637-638.**

It is also settled law that there is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the law or property without due process of law. **TIDAL OIL CO. v. FLANAGAN, 253 U.S. 444, 450-454, 68 L. Ed. 382, 44 S. Ct. 197 (1924); PATTERSON v. COLORADO, 205 U.S. 454, 461, 51 L. Ed. 879, 27 S. Ct. 556 (1907); BONNER v. GORMAN, 213 U.S. 86, 91, 53 L. Ed. 709, 29 S. Ct. 483 (1909); MILWAUKEE ELECTRIC RAILWAY CO. v. MILWAUKEE, 252 U.S. 100, 106, 64 L. Ed. 476, 40 S. Ct. 306 (1920); WORCESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 299, 82 L. Ed. 268, 58 S. Ct. 185 (1937); GREAT NORTHERN RAILWAY CO. v. SUNBURST OIL**

& REFINING CO., 287 U.S. 358, 364, 77 L. Ed. 360, 53 S. Ct. 145 (1932).

Based on the above-cited authority, Petitioners' Request for Writ of Certiorari must be denied. Petitioners' submission begs the question of a constitutional violation. Petitioners do not analyze or even mention the standard employed by this court when addressing a non-retroactivity issue. Indeed, Petitioners' lack of legal scholarship is stunning, if not sanctionable. Petitioners' submission fails to cite even one of this court's cases which concerns a non-retroactivity issue.

Lifting passages from lower court decisions, Petitioners attempt to fashion constitutional violations of due process and equal protection of the law without regard to this court's own pronouncements that the issues of retroactivity and prospectivity do not generally implicate constitutional violations. **LINKLETTER v. WALKER, supra, 381 U.S. 627; TIDAL OIL CO. v. FLANAGAN, supra; PATTERSON v. COLORADO, supra; BONNER v. GORMAN, supra; MILWAUKEE ELECTRIC RAILWAY CO. v. MILWAUKEE, supra; WORCESTER COUNTY TRUST CO. v. RILEY, supra; GREAT NORTHERN RAILWAY CO. v. SUNBURST OIL & REFINING CO., supra.**

Moreover, Petitioners cannot argue, and do not argue, that they are left remediless if their petition is denied. The action against Dr. Dias and his professional corporation is stayed in the trial court awaiting the outcome of these appellate proceedings.

Petitioners do not meet the threshold for non-retroactivity analysis; i.e., Petitioners cannot show that the decision in **ROSS v. CONSUMERS POWER CO. (On Reh.),**

420 MICH. 567; 363 N.W.2d 641 (1984) represents a "clear break" with the rule of law announced in **PARKER v. HIGHLAND PARK, 404 MICH. 183; 273 N.W.2d 413 (1978).**

The **ROSS** Court did not explicitly overrule the decision in **PARKER**. It only impliedly overruled the decision in **PARKER. HYDE, supra, 426 MICH. 231, 243.**

The **ROSS** Court did not overrule *clear precedent*. The court acknowledged the confused state of the law in Michigan over statutory immunity:

> " . . . We recognize that our case law on these questions is confused, often irreconcilable, and of little guidance to the bench and bar . . .
>
> * * *
>
> " . . . We note that the Legislature was certainly aware of our conflicting 'morass' of case law concerning the definition of 'governmental function' when it enacted §7 . . . " **420 MICH. 596, 610.**

Moreover, in context, the decision in **PARKER** was one of numerous unsuccessful efforts by the Michigan Supreme Court and the Michigan Court of Appeals to distill a cohesive, uniform, and workable set of rules defining the injured party's rights and the governmental agency's liability in the area of statutory immunity. **ROSS, supra, 420 MICH. 596-621; HYDE, supra, 426 MICH. 240-241.** Ironically, **PARKER** itself overruled prior precedent to the effect that the Supreme Court would be bound by the common-law definition of "governmental function". **ROSS, supra, 420 MICH. 609-610.**

The **HYDE** Court noted that a decision has been accorded limited retroactive effect when prior case law has been overruled or when a statute has been reconstrued, but that complete prospective effect has been given to decisions only when clear and uncontradicted case law has been overruled. 426 MICH. 240, citing **TEBO v. HAVLIK, 418 MICH. 350; 343 N.W.2d 181 (1984). See, also, GUSLER v. FAIRVIEW TUBULAR PRODUCTS, 412 MICH. 270; 315 N.W.2d 388 (1981).**

As the above cited passages make clear, the **HYDE** Court announced a rule of limited retroactivity, **426 MICH. 230-231, 246,** after weighing the merits and demerits of the alternatives, by looking to the prior history of the rule in question, its purpose and effect, and by weighing the inequity imposed by full retroactive application of the decision. As a result, there is no support in fact or in law for Petitioners' contention that the Michigan Supreme Court acted arbitrarily, unreasonably, and irrationally when it determined, as a matter of judicial policy, to give limited retroactive effect to the definition of "governmental function" which it announced in **ROSS**.

Petitioners appear to argue that their constitutional rights to due process and equal protection of the law have been violated by the failure of the Michigan Supreme Court to give wholly prospective effect to the **ROSS** decision; i.e., by the failure of the Michigan Supreme Court to hold that the definition which it announced be applied only to conduct occurring *after* the effective date of the decision. Petitioners do not dispute the **HYDE** Court's premise that the definition of "governmental function" was anything but clear and uncontradicted or that the consolidation of "nine factually diverse cases"

should have been a signal to bench and bar that the definition was being reevaluated. **426 MICH. 240-241.** In support of their position, Petitioners cite only ex post facto case law. Such authority is readily distinguishable. Petitioners also claim reliance amounting to a vested right in **PARKER'S** definition of "governmental function." It is settled law that a change of decision does not deprive a litigant of equal protection or due process of law.

Moreover, Petitioners' argument loses sight of the constitutionally-recognized power of the Michigan Supreme Court to determine what law will be applied in the courts of the State of Michigan. It is undisputed that there were literally hundreds of governmental immunity cases "waiting in the wings" for the decision in **ROSS**. They represented the best efforts of the various panels of the Court of Appeals to divine the meaning of "governmental function". Pure prospective application of the decision in **ROSS** would have overburdened the administration of justice in Michigan. It would not have resolved this logjam of cases awaiting appellate resolution. If the decision in the consolidated cases comprising **ROSS** represents the essence of the Michigan Supreme Court's constitutionally-empowered review function, the decision in **HYDE** that **ROSS'** definition of "governmental function" be given limited retroactive effect represents the essence of the Michigan Supreme Court's constitutionally-empowered oversight function.

In addition, Petitioners concede that the rational basis standard of review is the appropriate standard for this case. Using such a standard, Petitioners' unconstitutionality arguments must fail. Even if Petitioners can

show that application of **HYDE** discriminates against them in some way, such discrimination does not rise to the level of either a due process or an equal protection violation. The Michigan Supreme Court could have intended the limited retroactivity announced in **HYDE** to achieve uniformity in the law applied by the courts of the State of Michigan from and after January 22, 1985, the effective date of the **ROSS** decision. Similarly, the Michigan Supreme Court could have intended limited retroactivity in an effort to limit prejudice to the thousands of litigants whose cases were pending in which a governmental immunity issue had been raised and preserved as well as to all cases filed after January 22, 1985.

Petitioners fail to satisfy the requirements of this court to take up a non-retroactivity issue in this case. The **ROSS** decision did not explicitly overrule **PARKER**. Indeed, the opposite is true; **ROSS** only impliedly overruled **PARKER**. Prior precedent was anything but clear. The issue was not one of first impression. Weighing the merits and demerits of each case, looking to prior history of the rule in question, its purpose and effect, and whether retrospective application would further or retard its operation, it is clear that the decision to give **ROSS** limited retroactive effect was not arbitrary, irrational or unreasonable. The administration of justice would have been greatly overburdened by either wholly retroactive or fully prospective operation of the **ROSS** decision. As to the former, all of the cases decided on authority of **PARKER** would be open for reconsideration. As to the latter, the large number of cases which had been held in

abeyance awaiting the Michigan Supreme Court's treatment of "governmental function" would remain unresolved and without authoritative guidance for resolution.

CONCLUSION

Respondents respectfully request that this court deny Petitioners' Petition.

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